

C.M., Appellant

**U.S. POSTAL SERVICE, POST OFFICE,
Palo Alto, CA, Employer**

Appearances:

Sylvia R. Johnson, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

Before:

JURISDICTION

On March 26, 2019 appellant, through her representative, filed a timely appeal from two October 11, 2018 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the October 11, 2018 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a recurrence of total disability under OWCP File No. xxxxxx148, commencing September 21, 2017, causally related to her accepted employment injury; and (2) whether appellant has met her burden of proof to establish a lower back condition under OWCP File No. xxxxxx874 causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On May 14, 2007 appellant, then a 46-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging a lumbar injury when she opened the back door of her long-life vehicle (LLV) while in the performance of duty. On June 27, 2007 OWCP accepted the claim for lumbar sprain under OWCP File No. xxxxxx148. Appellant stopped work on September 29, 2009 and OWCP paid her wage-loss compensation for total disability on the periodic rolls.

Appellant sought treatment for her condition following the May 14, 2007 employment injury and OWCP authorized appropriate medical benefits. Beginning November 28, 2011, she sought treatment with Dr. Richard Nolan, a Board-certified orthopedic surgeon. By decision dated December 8, 2011, OWCP reduced appellant's compensation benefits based on the determination that she had the wage-earning capacity to work in the constructive position of a receptionist, *Dictionary of Occupational Titles (DOT) #237.367-038*.

On June 10, 2013 OWCP referred appellant, along with a statement of accepted facts (SOAF) to Dr. John Velyvis, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the nature and extent of her work-related conditions and disability. In a July 24, 2013 report, Dr. Velyvis found that prognosis for resolution was poor as appellant's sprain was chronic and had progressed to discogenic disease, facet hypertrophy, and radiculitis. He explained that traumatic injury to a weight-bearing joint (the lumbar spine) leads to regional anatomical changes that progressively worsen over time. In this instance, Dr. Velyvis found that a natural progression of her conditions was a gradual worsening. On September 23, 2013 he completed a revised report, which provided a similar discussion of appellant's conditions.

On September 29, 2014 appellant returned to work in a full-time modified-duty status. She continued working full-time modified-duty work until April 3, 2017 when she began working reduced hours because the employing establishment could no longer accommodate her work restrictions on a full-time basis.

On October 6, 2017 appellant filed a claim for compensation form (Form CA-7) for the period September 23 through October 5, 2017 under OWCP File No. xxxxxx148. In support of her claim, she submitted medical reports from Dr. Nolan who diagnosed lumbar sprain, spondylosis with radiculopathy, and lumbar facet joint syndrome. In a September 20, 2017 medical report, Dr. Nolan diagnosed lumbar radiculopathy resulting in temporary totally disability from September 20 through November 1, 2017.

The record reflects that on October 30, 2017, under OWCP File No. xxxxxx874, appellant filed an occupational disease claim (Form CA-2) alleging that she sustained lumbar sprain, spondylosis with radiculopathy, and lumbar facet joint syndrome due to factors of her federal

employment. She reported that she first became aware of her condition on May 14, 2007 and of its relationship to her federal employment on September 19, 2017.

By letter dated November 1, 2017, appellant's representative asserted that appellant was not alleging a recurrence of disability based on a spontaneous worsening of her prior lumbar injury. Rather, appellant was alleging that her current conditions and disability were related to the original May 14, 2007 employment injury as well as her federal employment duties.

By decision dated November 16, 2017, OWCP denied appellant's disability claim beginning September 20 through November 1, 2017, finding that the medical evidence of record was insufficient to establish that her current period of temporary total disability was due to a material worsening of her lumbar sprain without an intervening cause.

On December 13, 2017 appellant, through her representative, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, and submitted additional evidence in support of her claim.

During the hearing held on August 15, 2018, appellant testified that her lumbar condition was ongoing from May 14, 2007. She returned to work on September 29, 2014 in a full-time modified-duty capacity until April 3, 2017 when she returned to casing-type duties and her hours were reduced by the employing establishment. It was her return to the casing-type duties on March 28, 2017, which she alleged aggravated and caused her lumbar conditions. Dr. Nolan discussed appellant's lumbar conditions and asserted that the acceptance of the claim should be expanded due to appellant's federal employment duties. He further reported that her employment duties aggravated her initial work injury resulting in her temporary total disability beginning September 20, 2017.

By decision dated October 11, 2018, OWCP's hearing representative affirmed the November 16, 2017 decision denying appellant's disability claim beginning September 20, 2017 and continuing, finding that the medical evidence of record was insufficient to establish disability during the claimed period causally related to her accepted May 14, 2007 employment injury. The hearing representative denied the recurrence claim, finding that the evidence failed to show appellant suffered a spontaneous material change of her condition without an intervening injury. The hearing representative noted that appellant, her representative, and Dr. Nolan all opined that her employment duties from her part-time position caused her back conditions to worsen.

In an accompanying narrative statement, appellant reported a May 14, 2007 date of injury and described a progressive aggravation of her condition on March 28, 2017. Appellant attributed her conditions to reaching up, twisting, turning and casing mail, pushing and pulling hampers and mail carts. She stated that she was given a modified-duty position on September 16, 2014, which was changed to a regular-duty carrier position at four hours per day on March 28, 2017. Appellant reported that on August 8, 2017 she began working carrier duties two hours per day because the employing establishment could not accommodate her restrictions.

By decision dated February 16, 2018, OWCP denied appellant's claim, finding that she had not established the alleged employment factors and she had not submitted sufficient medical evidence to establish that a diagnosed medical condition was causally related to the alleged employment factors. It also noted that she had an accepted back condition under OWCP File No. xxxxxx148, with an injury date of May 14, 2007; however, the medical evidence of record did not

provide a detailed medical history, which differentiated between the effects of the employment-related condition and the current diagnosed conditions.

On March 13, 2018 appellant, through her representative, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on August 15, 2018, where appellant testified in support of her claim. At the hearing, appellant testified that she was initially assigned modified duty and subsequently placed back in her carrier-type duties of casing mail on March 28, 2017. This consisted of reaching up, twisting, turning while casing mail, pushing and pulling parcel hampers, pushing and pulling mail carts, pulling mail routes down from the case, and sorting parcels for split routes, which caused her physical problems. Appellant reported performing this work for eight hours per day, which was subsequently reduced to two hours per day because the employing establishment could not accommodate her work restrictions. She noted that aggravation and issues pertaining to her lumbar conditions began when she returned back to her casing-type duties on April 3, 2017. Appellant's representative asserted that she developed additional conditions resulting in her disability because the employing establishment had her working outside of her light-duty restrictions. As an example, she noted that appellant would case mail for two hours per day at the request of her supervisor despite restrictions stating no more than one hour per day. The record reflects that Dr. Nolan was also supposed to also testify at the hearing, but the call was not connected.

In support of her claim, appellant submitted exhibits containing both medical and factual evidence consisting of employing establishment offers of modified assignment (limited duty) as a city carrier, the most recent of which appellant accepted on March 28, 2017 with an effective start date of April 1, 2017. The offer of modified assignment was based on work restrictions provided from a November 25, 2015 duty status report (Form CA-17). Appellant also provided medical reports from Dr. Nolan dated July 11, 2017 through March 29, 2018, which provided a detailed medical history, noted the progression of her lumbar conditions and how it related to her federal employment duties and disability, and provided an opinion on the cause of appellant's conditions and expansion of the claim. OWCP also received a January 20, 2018 report from Dr. George Karalis, a Board-certified psychiatrist, discussing appellant's psychiatric conditions.

By decision dated October 11, 2018, OWCP's hearing representative affirmed the February 17, 2018 decision under File No. xxxxxx874, finding that the medical evidence of record was insufficient to establish that the diagnosed lumbar conditions were causally related to the alleged employment factors. The hearing representative reviewed and discussed medical reports found in File No. xxxxxx148 and determined that the two claims should be combined as they involved the same part of the body and required frequent cross-referencing.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which resulted from a previous injury of illness, without an intervening injury of new exposure to the work environment that caused the illness.⁴ Recurrence of disability also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn, or when the physical requirements of such

⁴ 20 C.F.R. § 10.5(x).

an assignment are altered so that they exceed his or her established physical limitations.⁵ Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to light duty may be established by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment.⁶

When an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of proof to establish that the recurrence is causally related to the original injury.⁷ This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the recurrent disability is causally related to the employment injury.⁸ The physician's opinion must be based on a complete and accurate factual and medical history and it must be supported by sound medical reasoning.⁹ Where no such rationale is present, the medical evidence is of diminished probative value.¹⁰

For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.¹¹ The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify their disability and entitlement to compensation.¹²

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision with regard to whether appellant has established her recurrence claim.

The Board notes that the two claims are alleging injury to the same body part resulting in disability as it relates to appellant's employment as a city carrier.

The Board notes that both files had a hearing scheduled on August 15, 2018 and both decisions were issued on October 11, 2018 by an OWCP hearing representative. The record reflects that Dr. Nolan testified during the hearing for File No. xxxxxx148, but did not testify during the hearing for File No. xxxxxx874 due to possible technical difficulties.

⁵ *Id.*

⁶ *G.L.*, Docket No. 16-1542 (issued August 25, 2017); *Theresa L. Andrews*, 55 ECAB 719, 722 (2004); *see also* *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁷ 20 C.F.R. § 10.104(b); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 and 2.1500.6 (June 2013).

⁸ *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *S.S.*, 59 ECAB 315, 218-19 (2008).

⁹ *Id.*

¹⁰ *G.L.*, Docket No. 19-0898 (issued December 5, 2019); *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

¹¹ *See B.D.*, Docket No. 18-0426 (issued July 17, 2019); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

¹² *Id.*, *Fereideoon Kharabi*, 52 ECAB 291 (2001).

In the October 11, 2018 decision issued for File No. xxxxxx148, the hearing representative did not request that the two claims be administratively combined. Nor did he discuss the medical evidence and exhibits submitted in support of appellant's claim which were cataloged in File No. xxxxxx148.

In the October 11, 2018 decision, issued under File No. xxxxxx874, the hearing representative requested that the two claims be combined due to cross-referencing of the evidence in File No. xxxxxx148. However, the decision failed to discuss all of the medical reports submitted in support of appellant's claim in the other case file and made no reference to Dr. Nolan's testimony provided in File No. xxxxxx148. The Board notes that, while the hearing representative requested that the claims be combined at the time of the October 11, 2018 decision, neither decision was issued based on a thorough and complete review of the other case record. While the record currently before the Board contains the medical records from both files, OWCP's decisions on appeal did not address all of the relevant medical and factual evidence upon which the Board could adjudicate appellant's present claim.¹³ Furthermore, it appears that a portion of the medical evidence submitted in support of appellant's occupational disease claim was incorrectly placed in OWCP File No. xxxxxx148, which was not discussed or evaluated in the final decision under File No. xxxxxx874.¹⁴ Although the record before the Board reflects that the claims were subsequently combined following the October 11, 2018 decision, the Board may not look at evidence that was not before OWCP at the time of the final decision for the first time on appeal.¹⁵ While OWCP's hearing representative specifically advised that OWCP should double the instant case with OWCP File No. xxxxxx148, this was not accomplished at the time the decisions were issued.¹⁶

OWCP failed to review these medical reports and make proper findings with respect to the conditions claimed.¹⁷ Thus, it failed to discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining its disposition so that appellant could understand the basis for the decision, as well as the precise defect and the evidence needed to overcome the denial of her claims.¹⁸ The Board finds that, for a full and fair adjudication, the claims in File Nos. xxxxxx874 and xxxxxx148 must be reviewed by OWCP following the doubling of the claims. This will allow OWCP to consider all relevant allegations and accompanying evidence in issuing a final decision and developing the claims.¹⁹

¹³ *J.D.*, Docket No. 19-1585 (issued October 9, 2020).

¹⁴ As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to the subject matter of the claim, which was properly submitted to OWCP prior to the time of issuance of its final decision be reviewed and addressed by OWCP. *See S.K.*, Docket No. 18-0478 (issued January 2, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); *William A. Couch*, 41 ECAB 548, 553 (1990).

¹⁵ *A.C.*, Docket No. 20-0917 (issued January 27, 2021); *id.*

¹⁶ OWCP's procedures provide that cases should be combined where correct adjudication depends on cross-referencing between files and where two or more injuries have allegedly occurred to the same part of the body. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c) (February 2000).

¹⁷ *See Y.C.*, Docket No. 19-1712 (issued November 6, 2020).

¹⁸ *M.J.*, Docket No. 18-0605 (issued April 12, 2019); *R.M.*, Docket No. 16-0532 (issued August 9, 2017).

¹⁹ *L.M.*, Docket No. 19-1490 (issued January 29, 2020).

The Board also notes that the record is unclear pertaining to appellant's employment duties and offer of modified assignment to determine the nature and extent of disability beginning September 21, 2017. The hearing representative never addressed the long-standing work limitations imposed by Dr. Nolan and accepted by the employing establishment, restrictions relevant to the determination of appellant's fitness-for-duty for the claimed period. Appellant reported that, prior to her work stoppage on September 20, 2017, her supervisor requested that she case mail for two hours per day, which was outside of her work restrictions and limited-duty assignment. However, the hearing representative failed to discuss appellant's work restrictions and whether temporary total disability was established under the legal standard for a recurrence, which also defines disability as working outside of a limited-duty assignment that exceeds physical limitations.²⁰ As OWCP failed to discuss the physical requirements of the position along with any accompanying documents submitted by appellant, it is unclear from the record what the physical requirements of city carrier position were and whether the physical requirements of the position were within appellant's medical restrictions.²¹ On remand it should obtain relevant evidence including a written description of the job duties and physical restrictions of the modified-duty position appellant performed as of April 3, 2017.²² OWCP should make proper findings of fact and provide reasons for its decision, pursuant to the standards set forth in section 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.126.13.²³

Accordingly, the Board will remand the case to OWCP to determine whether appellant has established her claim for a recurrence of disability, as well as expansion of the acceptance of her for additional conditions, as related to either employment injury under either File No. xxxxxx148 or xxxxxx874.²⁴ Following this and such further development as it deems necessary, OWCP shall issue a *de novo* decision.²⁵

CONCLUSION

The Board finds that this case is not in posture for decision.

²⁰ 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008). *See* 20 C.F.R. § 10.5(y) (defines recurrence of a medical condition as a documented need for medical treatment after release from treatment for the accepted condition).

²¹ *W.R.*, Docket No. 18-1782 (issued May 29, 2019).

²² *Id.*; *A.J.*, Docket No. 10-0619 (issued June 29, 2010); 20 C.F.R. § 10.510.

²³ *C.M.*, Docket No. 20-0428 (issued August 25, 2020).

²⁴ *G.P.*, Docket No. 19-1258 (issued July 14, 2020).

²⁵ In light of the disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the October 11, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 16, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board